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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 6 Misc.

ROBERT NORBERT GALVAN, PETITIONER

v.

U. L. PRESS, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, SAN DIEGO, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 27-34) is reported at 201 F. 2d 302.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1953 (R. 35), and a petition for rehearing was denied on March 9, 1953 (R. 36). The petition for a writ of certiorari was filed on May 25, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, making an alien's membership in the Communist Party at any time after entry grounds for deportation, is constitutional.

2. Whether the evidence adduced at the administrative hearings was sufficient to sustain the charge on which the order of deportation against petitioner was based.

3. Whether petitioner was given a fair and valid hearing.

STATUTE INVOLVED

As amended by Section 22 of the Internal Security Act of 1950, the Act of October 16, 1918 (40 Stat. 1012), as amended, provided, at the time involved in this case, as follows (8 U.S.C., Supp. V):[1]

§ 137. * * *

> Any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, * * * (iv) the Communist or other

[1] The statutory provisions here involved were repealed by Sec. 403(a)(16) of the Immigration and Nationality Act of June 27, 1952 (66 Stat. 163, 279) which recodified and reenacted these provisions without material change. See *id.*, Sec. 241(a), 66 Stat. 204.

totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state * * *;

* * *

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law: * * *;

(G) Aliens who write * * * any written or printed matter * * * advocating or teaching * * * (i) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law; * * *;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, * * * written or printed matter of the character described in subparagraph (G).[2]

§ 137-3. * * *

(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the

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[2] The substance of subsections (F), (G), and (H) of 8 U.S.C. (Supp. V) 137 (2) was, at the time of the original warrant of arrest in the instant case, contained in 8 U.S.C. (1946 ed.) 137(c), (d), and (e). Subsection (C) derived from Section 22 of the Internal Security Act of 1950, 64 Stat. 1006.

classes of aliens enumerated in section 137 (2) of this title, shall, upon the warrant of the Attorney General, be taken into custody and deported * * *.

STATEMENT

Petitioner was born in Mexico on June 6, 1911, and is a citizen of that country (T. 174).[3] He first entered the United States on March 13, 1918, and has resided in this country since that time (T. 175). On March 17 and 31, 1948, petitioner was questioned under oath by representatives of the Immigration and Naturalization Service. Although fully warned that he was not required to make a statement and that any statement he made might be used against him, he testified fully and freely concerning his membership in the Communist Party from 1944 to 1946. He offered to rejoin the party and act as an agent for the Government to obtain information about it in exchange for the right to remain in this country. (T. 177-182.)

On August 13, 1948, a deportation warrant for the arrest of petitioner was issued, which charged that he was deportable in that he had been, after entry, a member of an organization which advocated violent overthrow of the Government, and of an organization distributing written matter so advocating (T. 168). This warrant was served on petitioner on March 10, 1949, and on that day a

[3] The record in the instant case is in two parts, the record of proceedings in the Court of Appeals, herein designated "R." and the record of proceedings in the District Court, herein designated "T."

brief deportation hearing, acquainting petitioner with the charges against him, was conducted at which petitioner was represented by counsel of his own choice. At the conclusion of the hearing, petitioner was released on bond (T. 68-76).

On January 12, 1950, a second hearing was conducted at which petitioner was again represented by counsel of his own choice (T. 78). At this hearing petitioner refused to answer any questions concerning his Communist connections on the ground that such answers might incriminate him. The statements which he had made in 1948 were admitted in evidence (T. 82). In addition, a former member of the Communist Party, Mrs. Jona Cooley Meza, testified that in 1946 she and petitioner had been members of a Communist Party unit, the Spanish Speaking Club Unit; that petitioner had attended meetings which were open only to party members; and that he had been elected to the office of Educational Director of the Unit (T. 110-127).

These hearings were rendered invalid by the decision of this Court in *Sung* v. *McGrath*, 339 U. S. 33, holding that the Administrative Procedure Act was applicable to deportation proceedings.[4]

On December 12, 1950, petitioner was given a *de novo* hearing, at which he was again represented by counsel of his own choice (T. 33). At this hearing, by agreement of the parties, the transcript of the hearings held on March 10, 1949, and January

[4] On September 27, 1950, Pub. L. 843, 81st Cong., 64 Stat. 1044, 1048, exempted deportation hearings conducted thereafter from the hearing provisions of the Administrative Procedure Act.

12, 1950, together with the exhibits, were "made part of the present hearing * * * to be used in determining the facts in this case" (T. 34).

Immediately thereafter, the examining officer lodged an additional charge against petitioner, that he was deportable under Section 22 of the Internal Security Act of 1950 (*supra,* pp. 2-4) in that he had been, after entry, a member of the Communist Party. The hearing officer asked petitioner's counsel whether, in view of the additional charge, he desired a continuance of the hearing for a period of five days, to which counsel replied that he did not (T. 36). At this hearing petitioner denied that he had ever been a member of the Communist Party, and attempted to explain away his 1948 statements. He said that he had not understood what the examining officer meant by "Communist Party," thinking that he was referring to other organizations to which he belonged and meetings which he had attended (T. 37-50).

On December 19, 1950, the hearing officer found that petitioner had been a member of the Communist Party from 1944 to 1948, and ordered his deportation on that ground (T. 31-32). On July 25, 1951, the findings and decision of the hearing officer were adopted by the Assistant Commissioner, and, on September 26, 1951, an appeal was dismissed by the Board of Immigration Appeals.

On December 17, 1951, petitioner filed in the District Court for the Southern District of California a petition for a writ of habeas corpus (R. 2-5). After a hearing (R. 11), the petition was

denied (R. 13-17). On appeal, the Court of Appeals affirmed the order of the District Court (R. 27-34).

ARGUMENT

1. Petitioner's principal contention is that Section 22 of the Internal Security Act of 1950, which provides for the deportation of past members of the Communist Party, is unconstitutional (Pet. 4-6). This question was briefed, though not decided, in *Heikkila* v. *Barber*, 345 U.S. 229, and *Martinez* v. *Neelly*, 344 U.S. 916 (see Gov't. Br., No. 426, O.T. 1952, pp. 16-36, and Gov't. Br., No. 218, O.T. 1952, pp. 63-70).

This Court, in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, upheld the constitutionality of Section 23(a) of the Alien Registration Act of 1940, 8 U.S.C. (1946 ed.) 137, as applied in requiring the deportation of aliens who, after entry, had been members of an organization advocating the overthrow of the Government of the United States by force and violence, namely, the Communist Party, even though there was no finding that the particular aliens advocated, or knew that the Communist Party advocated, such violent overthrow. The only difference between the presently pertinent portion of Section 22 of the 1950 Act and the statute involved in the *Harisiades* case is that the 1950 Act specifies membership in the Communist Party as a basis for deportation. This change, which obviates the burdensome necessity of proving anew in each individual case that the Communist Party was at the time of the alien's membership an organization advocating the violent overthrow of the

Government, was made only after the Senate Committee on the Judiciary had given long and continuous consideration to the nature and purposes of the Communist Party. The report of this committee accompanying the bill in which Section 22 originated concluded that "[a]s an international conspiracy, communism has organized systematic infiltration of our borders for the purpose of overthrowing the democratic Government of the United States by force, violence, and subversion." [5] S. Rep. 2230, 81st Cong., 2d sess., p. 10. The Committee also found that the Communist Party in the United States is foreign-dominated and that both its leadership and membership are "recruited overwhelmingly from alien ranks" (*id.*, p. 12). These findings as to the objectives, methods, and foreign domination of the Communist Party were set forth by Congress in Section 2 of the Act (64 Stat. 987-989), where in subsection (1) it is stated that the Communist movement is "in its origins, its development, and its present practice * * * a world-wide revolutionary movement" seeking by any means found necessary to establish Communist dictatorships throughout the world. Thus, the 1950 Act is, in effect, a legislative determination that the Communist Party has been and is an organization

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[5] Other congressional committees, at least since 1931, have consistently reached the conclusion that the Communist Party sought the overthrow of the United States Government by force and violence. See, for example, H. Rep. 2290, 71st Cong., 2d sess., pp. 65-66; H. Rep. 153, 74th Cong., 1st sess., pp. 12, 21.

dedicated to the forceful overthrow of the Government.[6]

This conclusion, when considered in light of this Court's decision in the *Harisiades* case, *supra*, holding that membership in an organization seeking the forceful overthrow of the Government, even though discontinued, is a legitimate ground for deportation, whether or not the alien knew of the organization's revolutionary objective, removes any serious question as to the constitutionality of Section 22 of the Internal Security Act of 1950. It is a reasonable exercise of the power of Congress to provide for the deportation of any class of aliens whose presence in this country may endanger its security.[7]

2. Petitioner's second contention, that the evidence was insufficient to sustain the charge that he was a member of the Communist Party of the United States from 1944 to 1948 (Pet. 7-9), is wholly devoid of merit. In his testimony of March 17 and 31, 1948 (T. 177-188), he freely admitted that he had been a member of the Communist Party, testified as to who had induced him to join and

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[6] This Court has on several occasions concurred in—or at least found that there was ample evidentiary support for—this conclusion as to the objectives and methods of the Communist Party in the United States. *Harisiades* v. *Shaughnessy*, *supra*; *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 388; *Dennis* v. *United States*, 341 U.S. 494; *Carlson* v. *Landon*, 342 U.S. 524, 535-536.

[7] Compare Section 22 with the Alien Enemy Act of 1789 (1 Stat. 577), providing for apprehension and removal of aliens who are citizens of a foreign nation which threatens a "predatory incursion" against the United States. Cf. *Ludecke* v. *Watkins*, 335 U.S. 160.

where he had joined, and gave other details. This testimony shows that he had joined the Communist Party and participated in its activities in San Diego, California.

Petitioner does not contend that this evidence was insufficient to show that he was a member of the Communist Party. Instead, he argues that because the Party was referred to as the "Communist Party," except in two instances where it was called the "Communist Party of the United States," the testimony was insufficient to prove that he was a member of the Communist Party of the United States. It is beyond conjecture that it is the Communist Party of the United States that operates in San Diego, California. But petitioner's argument would be baseless in any event; for membership in any branch or subdivision of the Communist Party, American or foreign, is grounds for deportation (see 8 U.S.C. (Supp. V) 137 (C)(iv), *supra*, pp. 2-3).

Petitioner's 1948 testimony was thoroughly corroborated by that of a former member of the Party, Mrs. Meza, who testified that she and petitioner had been members of the same Communist Party unit in San Diego, that petitioner had attended meetings which were open only to Party members, and that he had been elected to an office in the Unit. She also was acquainted with the same party members who had been mentioned by petitioner in his 1948 statement. Contrary to the statement in the petition (Pet. 7), Mrs. Meza testified that this unit, the Spanish Speaking Club, was a unit of the Communist Party (T. 110-127).

3. Petitioner's final two arguments relate to the alleged unfairness and impropriety of introducing a new charge at the hearing held on December 12, 1950, and of proving this charge by means of petitioner's testimony at previous hearings.

The regulations in force in December 1950, 8 C.F.R. § 151.2(d), authorized the lodging of additional charges if it developed during the hearing that there were grounds for deportation in addition to those contained in the warrant of arrest. Here, subsequent to issuance of the warrant of arrest, petitioner became subject to deportation because of membership in the Communist Party following enactment of the Internal Security Act of September 23, 1950 (64 Stat. 1006). When this charge, which was merely a more specific form of one of the original grounds, was lodged, counsel was advised by the hearing officer as follows:

> * * * In view of the fact that the Examining Officer has lodged this additional charge, I may inform you that you have the right at this time to request a further continuance of this hearing, which may be granted you to secure evidence to show cause why the respondent should not be deported upon this additional charge * * *, and I would like to ask you at this time if you desire a continuance [T. 36].

Petitioner's counsel unhesitatingly and unequivocally declined this offer (T. 36). It is clear that petitioner was not caught unprepared by the lodging of the new charge, and he cannot now claim that he was prejudiced thereby.

Similarly, there is no substance in petitioner's complaint that the record made at hearings held pursuant to the charges in the original warrant of arrest was improperly admitted in evidence at the December 12, 1950, hearing. No objection was made at the time. On the contrary, the transcripts were admitted by express agreement between the examining officer and counsel of petitioner's choice (T. 34). Petitioner does not suggest that there was any unfairness in the conduct of the prior hearings at which he had admitted his Communist associations; nor does he claim that the right to question him in rebuttal, which was reserved by counsel at the time of the agreement, was in any way restricted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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